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### Federal and Indian Reserved Rights: Outline

Robert S. Pelcyger

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OUTLINE  
FEDERAL AND INDIAN RESERVED RIGHTS  
by  
ROBERT S. PELCYGER

WATER RESOURCES ALLOCATION:  
LAWS AND EMERGING ISSUES  
UNIVERSITY OF COLORADO SCHOOL OF LAW  
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## FEDERAL AND INDIAN RESERVED RIGHTS

Robert S. Pelcyger, Attorney  
Native American Rights Fund  
June 1981

- I. Introduction: Reserved Water Rights Differ From Water Rights Acquired Under The Prior Appropriation And Riparian Systems But Have Characteristics Of Both Appropriative And Riparian Rights.
  - A. Reserved Water Rights Are Property Rights Predicated On Federal Law And Are Not Dependent On State Substantive Law.
    1. Like riparian rights, reserved water rights are not based on actual appropriation and use. They are not lost by non-use. They are measured by the amount necessary to fulfill a reservation's purposes for the past, present and future.
    2. Like appropriative rights, reserved water rights have a priority date - no later than the date on which the reservation was established.
    3. Unlike riparian rights, reserved water rights are not shared or correlative rights and are not ratably reduced in times of shortage.
  - B. Reserved Water Rights Are A Product of Judicial Decisions, Not Legislation.

C. Principal Precedents

1. Winters v. United States, 207 U.S. 564 (1908)
2. United States v. Powers, 305 U.S. 527 (1939)
3. Arizona v. California, 373 U.S. 546, 597-601 (1963), decree, 376 U.S. 340 (1964), supplemental decree, 439 U.S. 419 (1979)
4. United States v. District Court for Eagle County, 401 U.S. 520 (1971)
5. United States v. District Court for Water Div. No. 5, 401 U.S. 527 (1971)
6. Colorado River Water Conservancy District v. United States, 424 U.S. 800 (1976)
7. Cappaert v. United States, 426 U.S. 128 (1976)
8. United States v. New Mexico, 438 U.S. 695 (1978)

D. The last two Supreme Court decisions of the Burger Court involving reserved rights, Cappaert and New Mexico, neither of which concerned Indian reservations, reflect very different and conflicting approaches.

II. Conflict Between Reserved Water Rights and State Management Objectives

A. Uncertainty - It is difficult to know the amount of water that is reserved to fulfill a reservation's purposes without a judicial or some other form of quantification.

B. Dual Administrative Systems - Water rights on federal and Indian reservations may be administered by federal and tribal officials who base their decisions concerning common water sources on different factual predicates.

C. Application of different rules and standards - Holders of federal and Indian water rights are (or may be) subject to different rules and standards than their state counterparts governing such matters as obtaining changes in the nature and place of use of water and utilizing underlying ground waters.

D. Lack of notice - Unlike most state systems, there has not been any repository of federal and Indian reserved water rights.

### III. Differences Between Indian Reserved Water Rights And Federal Reserved Water Rights

A. Conflicting Historical Policies - Congress has generally deferred to state water laws but state laws are generally not applicable to Indians and Indian property within reservations.

B. Different Jurisdictional Status - The scope of federal preemption of state law is much broader on Indian reservations than over most other federally owned lands.

- C. Different Rules of Construction - Indians retain everything not expressly ceded by treaty; the documents establishing their reservations are construed generously to effectuate their purposes. The application of state water laws over other federal reservations is preempted only to the extent that those laws actually or potentially conflict with the primary federal objective in establishing such reservations.
- D. Different Purposes - Indian reservations are intended to be permanent, economically self-sufficient homelands and that entails utilization and development of the reservations' resources whereas other federal reservations are principally devoted to the preservation of resources.
- E. Other Differences - Indian water rights may carry an aboriginal priority and Indian reserved water rights, unlike publicly owned federally reserved rights, are protected by the Fifth Amendment and perhaps other constitutional safeguards.

#### IV. Scope Of Federal And Indian Reserved Rights

- A. Reservations established by treaty, agreement, statute, executive order or secretarial order are entitled to reserved water rights.

- B. Reserved water rights may attach to all sources of water that arise on, border, traverse, underlie or are encompassed within reservations.
- C. Reserved water rights may encompass water quality as well as quantity.
- D. Reserved water rights may be exercised by federal and tribal lessees and permittees as well as by Indians, Indian tribes and the federal government.
- E. Reserved water rights are not limited to uses that were foreseen or were foreseeable when a reservation was established.
- F. The purposes of federal (non-Indian) reservations are construed narrowly in accordance with congressional policy to defer to state water laws. Once those purposes are determined, however, courts must quantify the full extent of the reserved right without balancing competing interests or weighing relative hardships.
- G. Federal and Indian water rights are prior and paramount to all water rights established under state law that were not vested on the date the reservation was established. Unused riparian rights defined by state law are generally held not to be Fifth Amendment protected, vested, property rights.